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CASE CLIPS

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CRIMINAL LAW ISSUES

DILL v. STATE, No. 53S01-0008-CR-504, ___ N.E.2d ___ (Ind. Feb. 7, 2001).
DICKSON, J.

The defendant, Michael S. Dill, was convicted of burglary [footnote omitted] and conversion. [Footnote omitted.] . . . The Court of Appeals affirmed. Dill v. State, 727 N.E.2d 22 (Ind. Ct. App. 2000). . . .

In this appeal, the defendant argues, in part, that flight instructions are inherently improper. The State urges that the instruction correctly states the law, noting several recent cases in which this Court has failed to find error in the giving of a flight instruction.

In Bellmore v. State, 602 N.E.2d 111 (Ind. 1992), we confronted an instruction that informed the jury that flight and other actions calculated to hide a crime, though not proof of guilt, are evidence of consciousness of guilt and are circumstances which may be considered by you along with other evidence. [Citation omitted.] Responding to the issues presented, we found that the instruction could not "'reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense.'" [Citation omitted.] Although we concluded that the specific language of the instruction, particularly in the context of the other instructions, did not constitute infringement of the defendant's right to due process of law, we nevertheless recommended against the future use of this instruction, but did not articulate our reasons or otherwise provide explicit guidance. Since Bellmore, we have repeatedly noted this recommendation but have not actually applied it to find error. *See* Bufkin v. State, 700 N.E.2d 1147, 1151 (Ind. 1998) (deciding the issue on the basis of the defendant's trial objection, which was not based on Bellmore, but rather asserted only that the evidence did not support the instruction); Fleenor v. State, 622 N.E.2d 140, 147 (Ind. 1993)(declining to find error in the giving of a flight instruction at trial that occurred in 1983, before our opinion in Bellmore, but noting "this Court has more recently recommended against the use of such instructions"); Walker v. State, 607 N.E.2d 391, 394 (Ind. 1993)(holding a flight instruction given in a 1991 trial was a correct statement of law, but noting that, in Bellmore, "this Court has recommended against future use of the flight instruction."); *see also* McCord v. State, 622 N.E.2d 504, 512-13 (Ind. 1993)(finding no error in the use of a flight instruction in 1991 trial, with no reference to Bellmore).

In the present case, the trial judge acknowledged the Bellmore directive but, noting the subsequent Bufkin opinion that permitted a flight instruction, he proceeded to give the flight instruction used in Bellmore. The defendant timely objected on several grounds, including that we had recommended against its use, that the instruction focused excessive attention on evidence of flight, and that it was confusing. Record at 568-69. Implementing our directive in Bellmore, we now hold that the trial court erred in giving the flight instruction.

The instruction is confusing, it unnecessarily emphasizes certain evidence, and it has great potential to mislead the jury.

This instruction is inherently contradictory because it simultaneously informs the jury that a person's flight after the commission of a crime is "not proof of guilt" but yet is "evidence of consciousness of guilt" and "may be considered." The purpose of a jury instruction "is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." [Citation omitted.] . . .

Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation omitted.] Johnson v. State, 258 Ind. 683, 686, 288 N.E.2d 517, 519 (Ind. 1972). However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations omitted.] . . .

We further find error in the giving of the flight instruction because of its significant potential to mislead. . . . "The fact that a defendant flees or does not flee does not indicate either guilt or innocence of itself and instructions calling attention to this situation may only serve to highlight an otherwise ambiguous occurrence." [Citation omitted.] . . .

Because this flight instruction is confusing, unduly emphasizes specific evidence, and is misleading, we hold, in accordance with our directive in Bellmore, that it was error to give the instruction.

. . . .

BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

SHEPARD, C. J., filed a separate written opinion in which he dissented, in part, as follows:

> This Court observes repeatedly that a trial judge should give instructions relevant to the issues raised by the parties, and our state's trial practice features scores of instructions about particular aspects of various causes of action, given regularly by trial judges and regularly approved on appeal.
>
> Against this relatively liberal backdrop, I find little justification for putting flight instructions on the extremely short list of those which are completely prohibited.
>
> A reasonably comprehensive survey reveals that hardly any other state supreme courts share my colleagues' anxiety about such instructions. . . .
>
> **. . . .**
>
> Moreover, while the U.S. Supreme Court found error in certain flight instructions late in the nineteenth century, [footnote omitted] modern federal authority overwhelmingly upholds properly worded flight instructions supported by sufficient factual predicates. [Citations omitted.]
>
> **. . . .**
>
> All in all, I would prefer to leave us where we were in Bellmore.

VASQUEZ v. STATE, No. 49S02-0012-CR-740, ___ N.E.2d ___ (Ind. Feb. 2, 2001).

BOEHM, J.

Opinion replaces Vasquez v. State, 735 N.E.2d 1207 (Ind. Ct. App. 2000), trans. granted (Dec.7, 2000), (Darden, J., dissenting). In that case, a majority held that "State failed to present sufficient evidence that the substance found was toluene", a substance used in crime of glue sniffing IC 35-46-6-2, because State's presentation of lay opinion testimony of two police officers that substance was "toluene" was based "solely upon their previous experiences with the smell and appearance of the substance"and not upon "special training" in area of "identification by smell". Majority reversed trial court's judgment of conviction. The supreme court held: Evid. R. 701 lay opinion testimony of police officers was sufficient to support this glue sniffing conviction, and the trial court's judgment of

conviction was affirmed. Testimony that substance "smelled and looked" like "toluene" coupled with testimony that "the rag and bottle" found with defendant "were paraphernalia associated with inhaling toluene" was "sufficient" as "circumstantial evidence" of drug identification "to support the trial court's finding that the substance contained toluene". [Editor's note: Decision was not reported in either "*Case Clips*", Vol. XXVII or in most recent transfer table Vol. XXVIII No. 2, January 26, 2001.]

CIVIL LAW ISSUES

HERTZ v. SCH. CITY OF EAST CHICAGO, No. 45A04-0004-CV-162, ___ N.E.2d ___ (Ind. Ct. App. Feb. 6, 2001).

ROBB, J.

On February 1, 1997, Hertz arrived at the school to attend a wrestling meet. As she crossed the parking lot, she slipped and fell. She fell a second time on the sidewalk leading to the school. There was an accumulation of ice and snow on both the parking lot and the sidewalk of the school. As a result of the two falls, Hertz was injured.

. . . .

Hertz contends that the trial court erred in granting summary judgment in favor of the school because the governmental entity was not entitled to immunity under Indiana Code section 34-13-3-3. We agree.

. . . .

We believe that the determination of whether the school was entitled to summary judgment hinges on whether the ice and snow accumulation on the school's parking lot and sidewalk was a "temporary" condition within the meaning of Indiana Code section 34-13-3-3. . . .

> [Quotation from Catt v. Board of Comm'rs of Knox County, 736 N.E.2d 341 (Ind. Ct. App. 2000)]
>
> :
>
> [A] determination of whether a condition is 'temporary' as set forth in Indiana Code section 34-13-3-3 hinges on the unique factual circumstances of a case; a 'bright line test' is inapplicable for purposes of this analysis. Id. at 345. For example, inclement weather, such as heavy rainfall, may temporarily cause a roadway or bridge to be dangerous or impassable for motorists because of flooding. However, if this condition is due to poor inspection, design, or maintenance of the thoroughfare then the condition of the thoroughfare could be considered 'permanent' under Indiana Code section 34-13-3-3.] . . .

In opposition to the school's motion for summary judgment, Hertz designated her deposition that established that on February 1, 1997, she suffered injuries when she fell due to the icy condition of the school's parking lot and sidewalk. R. 97, 78. In addition, Hertz designated the deposition of Victor Sanchez, the maintenance supervisor of the school, which established that there was no precipitation on February 1, 1997, and that the last day it had snowed was on January 26, 1997. Thus, a significant time period existed between the accumulation of snow and ice and Hertz's fall on the parking lot and sidewalk of the school. Therefore, we believe that Hertz's designated materials are sufficient to raise and issue of fact with respect to the school's contention that the sole and proximate cause of Hertz's injuries was the "temporary" condition of the parking lot and sidewalk caused by the snow and ice. Because the school failed to satisfy its burden of proof that no genuine issue of material fact exists, we believe that the trial court erred in concluding that the school was entitled to statutory sovereign immunity.[2]

. . . .

[2] We agree with the dissent that Hertz has not alleged that the parking lot and sidewalk were defectively designed. However, unlike the dissent, we believe it is a question for the fact finder whether the school's parking lot and sidewalk remained a "temporary condition" in light of the allegations that the school had failed to act in a timely manner as provided in the statute and local ordinance in not removing the ice and snow which had accumulated and caused the thoroughfares to become slick, and thus defective.

MATTINGLY, J., concurred.

MATHIAS, J., filed a separate written opinion in which he dissented, in part, as follows:

> I respectfully dissent for the majority's determination that the school is not entitled to immunity under the Indiana Tort Claims Act ("ITCA"), I.C. § 34-13-3-3 (3).
>
> . . . [H]ertz alleges, and the majority holds, that even though her injuries were caused by the snow and ice accumulated in the parking lot and on the sidewalk, the school is not entitled to immunity because it was aware of the accumulation and had time and opportunity to remove it. The main authority for this position seems to be Van Bree v. Harrison County, 584 N.E.2d 1114 (Ind. Ct. App. 1992), trans. denied.
>
> . . . .
>
> Our attention is drawn to language in Van Bree stating that a governmental entity "could be held liable under the common law for failure to remove snow and ice if it could be shown snow and ice were an obstruction to travel and that the [governmental entity] had an opportunity to remove the snow and ice." Id. (citing Ewald v. City of South Bend, 104 Ind. App. 679, 12 N.E.2d 995 (1938)). Approving of the pre-Tort Claims Act reasoning of Ewald, this Court went on to state that the burden was on Van Bree to "present evidence that the road had become defective because of the snow and ice and that the county had time and opportunity to remove it." [Citation omitted.] . . .
>
> . . . However, Hertz points to no evidence that the parking lot or the sidewalk had "become defective" due to the accumulation of snow and ice. Id. at 1118. She does not allege there were potholes or other irregularities in the surface or structure of the parking lot or sidewalk that were the result of accumulated snow and ice. Rather, she alleges only that the areas were slick.
>
> In addition, Hertz has never alleged that her slip and fall incidents were due to a temporary weather condition that demonstrably and repeatedly created a hazard due to an underlying design defect. . . .
>
> . . . .

BUCKALEW v. BUCKALEW, No. 34A05-0004-CV-174, ___ N.E.2d ___ (Ind. Ct. App. Feb. 7, 2001).

BARNES, J.

> Kim Buckalew appeals from the trial court's denial of her motion for relief from judgment, which sought to set aside a dissolution of marriage decree entered pursuant to a settlement agreement executed by her and her ex-husband, Tim Buckalew. We reverse and remand. [Footnote omitted.]
>
> . . . .
>
> The UAW attorney also prepared a "Waiver of Service of Process and Venue" signed by Kim, and a "Waiver of Final Hearing" and a "Waiver of Domestic Relations Disclosure Form" that both parties signed. The parties also signed a "Settlement Agreement Upon Dissolution of Marriage," which had been prepared by the UAW attorney and to which the prenuptial agreement was attached as an exhibit.
>
> . . . .

Civil Rule 16(B) of the Howard County Circuit Court provides in pertinent part:

> . . . [E]ach party to an action for divorce or separation shall cause to be filed with the Court in which the action is pending, an Income and Property Disclosure Form which shall be from time to time designated and approved by the Howard County Courts. . . .
>
> . . . .
>
> . . . No final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed disclosure form is filed with the Court, . . . [.]

Tim acknowledges that no disclosure form contemplated by the rule was filed and that Kim was not represented by counsel when she executed the "Waiver of Domestic Relations Disclosure Form." The waiver Kim signed was apparently an attempt to bypass the requirement that the parties submit a property disclosure form.

"The authority of trial courts to adopt local rules, as long as they are not inconsistent with any statute or rule promulgated by our supreme court, is without question." [Citations omitted.] Tim does not argue that Howard County Civil Rule 16(B) is in conflict with any of our supreme court's trial rules or any statute. . . . "Before a court may set aside its own rule, and it should not be set aside lightly, the court must assure itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule." Id. Generally, rules that are jurisdictional, defined as those that set time limitations or other requirements that must be met before the court may hear the case, are mandatory and not directive. Id. at 1311 n.2.

It is evident that Howard County Civil Rule 16(B) is jurisdictional in nature and, therefore, it is mandatory and compliance with it cannot be waived. The rule clearly states that a Howard County Court cannot conduct a final hearing or enter a marital dissolution decree unless the required income and property disclosure forms are filed with the court. It is further clear that the only exception to this mandatory requirement is where the parties are each represented by separate counsel and a waiver is filed; both elements to the exception must be satisfied.

. . . .

Tim also argues that the parties and the trial court "acknowledged . . . that the local rule mandating a Financial Disclosure Form be filed (unless it is waived) is not observed as a matter of practice in Howard County courts." [Citation to Brief omitted.] Indeed, the record contains the following colloquy regarding the rule at the hearing on the motion for relief from judgment:

> [Trial Court]: Course we all know that it's observed in the --
>
> [Kim's counsel]: Rule book but not in practice.
>
> [Trial Court]: It's observed in the --
>
> [Tim's counsel]: Twilight zone.

[Citation to Record omitted.] Tim does not cite authority for the proposition that a trial court has the discretion not to follow its rules as a matter of practice. . . . If the courts of Howard County truly believe that Civil Rule 16(B) is too much of a hindrance or inconvenience to be followed regularly, then it would be entirely within their prerogative to repeal or modify that rule. Otherwise, it must be followed.

. . . [T]he dissolution decree was "void" due to the trial court's failure to follow its own mandatory rule. . . .

. . . .

BAILEY and RILEY, JJ., concurred.

RAY-HAYES v. HEINAMANN, No. 89A05-0007-CV-306, ___ N.E.2d ___ (Ind. Ct. App. Feb. 7, 2001).

HOFFMAN, Senior Judge

Plaintiff-Appellant Sheila Ray-Hayes ("Hayes"), as parent and natural guardian of Amanda K. Ray ("Ray"), filed a complaint against Ryan S. Heinamann ("Heinamann") on July 22, 1998, for injuries she alleged that Ray sustained while a passenger in a 1991 Nissan Sentra operated by Heinamann on October 21, 1997. Hayes alleged in her complaint that Heinamann fell asleep while operating the vehicle resulting in the vehicle striking a cement culvert wall. On May 7, 1999, Hayes moved to amend her complaint to add defendants Nissan North America, Inc. ("NNA") and Nissan Motor Company, Ltd. ("NMC") alleging product liability for a defective passenger restraint in the vehicle in which Ray was a passenger. [Footnote omitted.] . . . Hayes filed her amended complaint adding NNA and NMC as defendants on September 13, 1999. The summonses for NNA and NMC were filed with the court on January 21, 2000.

NNA filed a combined Ind. Trial Rule 12(b)(6) and Ind. Trial Rule 41(E) motion to dismiss on March 29, 2000. NMC filed its combined Ind. Trial Rule 12(b)(6) and Ind. Trial Rule 41(E) motion to dismiss on April 17, 2000. In those motions NNA and NMC argued that because Hayes did not file the summonses relating to them until after the expiration of the statute of limitations Hayes' claims against them should be dismissed. The trial court granted the motion filed by NNA and the motion filed by NMC in an order dated July 6, 2000, which reads in relevant part as follows: . . . [.]

> **. . . .**
>
> As Defendants correctly note, the recent Indiana Court Of Appeals decision of *Fort Wayne Int'l Airport v. Wilburn*, 723 N.E.2d 967, holds that a lawsuit is not commenced and the statute of limitations tolled by the filing of a complaint unless the summons and filing fee are also tendered to the court prior to the expiration of the statute of limitations. Since the Summonses were not tendered to the Court prior to the expiration of the statute of limitations, the lawsuit as to these Defendants was not commenced until after the statute of limitations had already run. Accordingly, under the *Wilburn* decision, this Court finds that Defendants[sic] motions must be granted.

[Citation to Record omitted.]

. . . .

In *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993), our supreme court granted transfer in a matter arising out of small claims court to determine the question of whether the statute of limitations is tolled when a complaint is tendered to the clerk, but the prescribed filing fee is not. . . . The court held that a notice of claim or complaint is not filed unless the filing of the fee and the notice/complaint have occurred by any of the means permitted by T.R. 5(E). [Citation omitted.]

In the aforementioned *Wilburn* case, the majority of a panel of this court held that a plaintiff had to tender the complaint, the summons, and the fee prior to the expiration of the applicable statute of limitations in order for the action at issue to be deemed commenced. . . . The majority cited to a footnote in the *Boostrom* case wherein the supreme court stated as follows:

> The plaintiff, of course, controls the presentation of all the documents necessary to commencement of a suit: the complaint, the summons, and the fee. Boostrom used a standard pre-printed small claims form, which contains the complaint and the summons on a single page. She thus filed two of the three items necessary to commencement of her action.

[Citation omitted.]

The majority in *Wilburn* interpreted this footnote from *Boostrom* to mean that commencement of *all* actions required the presentation of a complaint, summons and fee prior to the expiration of the statute of limitations. However, *Boostrom* involved a small claims action. . . . We hold that *Boostrom* should be limited in application to its facts.

T.R. 3 provides that "[a] civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute." [Footnote omitted.] . . . Because Hayes filed her complaint within the two-year statute of limitations for products liability claims as is required by the trial rules and by statute, we find that Hayes complied with T.R. 3. Thus, we hold that the trial court erred by dismissing her cause of action because the summonses were filed after the expiration of the statute of limitations period.

. . . .

BAKER, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows:

It is not within the prerogative of this court to overrule a clear and unmistakable ruling of the Indiana Supreme Court. Yet, the majority, here, has in effect done so.

. . . .

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